



In the Matter of:

**WILLIAM GARY WIGNALL,
COMPLAINANT,**

v.

**UNION PACIFIC RAILROAD CO.,
RESPONDENT.**

ARB CASE NO. 10-103

ALJ CASE NO. 2009-FRS-005

DATE: February 22, 2012

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Karl J. Frisinger, Esq.; *Yaeger, Jungbauer & Barczak, PLC*; Minneapolis, Minnesota

For the Respondent:

Robert N. Belt, Esq.; *Union Pacific Railroad Company*; Omaha, Nebraska

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

William Gary Wignall filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA), alleging that his employer, Union Pacific Railroad (Union Pacific), abolished his position in violation of the employee protection provisions of the Federal Railroad Safety Act (FRSA), 49 U.S.C.A. § 20109 (Thomson/Reuters 2011), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No.110-53. Following a hearing, an Administrative

Law Judge (ALJ) dismissed Wignall's FRSA complaint because he found that Wignall failed to prove that his position was abolished due to any protected activity, and that, in any event, Union Pacific proved by clear and convincing evidence that it would have abolished the welding position that Wignall held regardless of such activity. Wignall petitioned the Administrative Review Board (ARB or the Board) for review. We affirm.

BACKGROUND

A. *Facts*

The facts set out below are from the ALJ's Decision and Order (D. & O.), and testimony and exhibits from the administrative hearing.

Wignall began working as a welder for Union Pacific around 2001. D. & O. at 2. He worked on a two-person welding gang, and in 2003, began working with welder Les Jacobi. *Id.* Russell Rohlfs, Wignall's supervisor, managed track maintenance for the company. *Id.* Wignall testified that during 2007, he asked Rohlfs six or seven times to assign a lookout to him and Jacobi when they performed thermite welds. *Id.* at 2, 5. Wignall believed a lookout was required to ensure worker safety. *Id.* at 2-3. Wignall testified that a lookout was a person "trained and qualified to alert others of a train's approach." *Id.* at 2, citing Hearing Transcript (Tr.) at 61. Rohlfs testified that Wignall never specifically requested a lookout; he stated that Wignall asked for "tools, equipment and section help," which included a "foreman, an assistant foreman and another person who repaired tracks and installed ties," but not a lookout. *Id.* at 5 (citing Tr. at 295-296). Rohlfs testified that a lookout would not be necessary because Wignall could "ask Jacobi or one of the other section workers to directly function as a lookout." *Id.* at 6 (citing Tr. at 296-297).

Bobby Odom, Director of Rules, Safety and Training for Union Pacific's Engineering Department testified that there is more than one on-track safety method to warn of incoming trains, and that a "lookout may be one of these methods." D. & O. at 3 (citing Tr. at 127; CX 36). Odom testified that if Wignall and Jacobi were "working together, it would be permissible for one to serve as a lookout while the other performed welds." *Id.* at 4 (citing Tr. at 152). Odom also testified that when welders are working on one track, they do not need a lookout for trains passing on an adjacent track, unless they are fouling the track, which, Odom stated, "should not" be done "unnecessarily." *Id.* at 4 (citing Tr. at 149; CX 17 at 3). Odom further testified that "given the task a welder performs, there would be no reason to foul an adjacent track with equipment" and that the "equipment would be loaded and unloaded from the field side of the track or directly out of the back of the truck." *Id.* at 4 (citing Tr. at 152-53).

In 2007, Union Pacific implemented a cost-cutting program called Project 75, with the goal of "reduc[ing] costs without compromising safety." D. & O. at 7 (citing Tr. at 300, 323). Rohlfs decided to abolish a welder position on a ten-person gang in April 2008 for budgetary reasons. *Id.* (citing Tr. at 302-03). Rohlfs consulted with other track management managers in the Council Bluffs Service Unit (the local service unit), and learned that "his gang was the only one with two welders instead of a welder and a welder-helper." *Id.* (citing Tr. at 304-05, 335).

Rohlf's consulted with Steve Hoerstkamp, the Director of Track Maintenance for the Council Bluffs Service Unit and his former supervisor, and then abolished eight to ten other positions in 2008, including "a foreman, assistant foreman, laborer, and machine operators" to "consolidate the jobs and complete the same work." *Id.* at 7 (citing Tr. at 306-09). Rohlf's employed other cost-saving measures when ordering supplies and making equipment repairs." *Id.* at 7 (citing Tr. at 309-10). Hoerstkamp gave Rohlf's permission to "abolish the extra welder position." *Id.* at 7 (citing Tr. at 370; see also *id.* at 8 (ALJ citing a company manager's e-mail (CX 9) that "Rohlf's . . . abolished the welder position in order to be consistent with other welding gangs in the service unit and as a cost savings measure.")).

On April 7, 2008, Union Pacific abolished Wignall's welder position. D. & O. at 6. The International Brotherhood of Blacksmiths and Boilermakers had a seniority roster listing federated welders, and the positions "held by [Wignall] and Jacobi." *Id.* at 6 (citing Tr. at 90; CX 2). When Wignall's "position was abolished, Jacobi was fourth in seniority and [Wignall] was fifth, meaning that of the two, it was [Wignall]'s job which had to be abolished." *Id.* at 6 (citing Tr. at 90).

B. Proceedings Below

Wignall filed a complaint with OSHA on September 19, 2008, alleging that Union Pacific abolished his position in violation of the FRSA's employee protection provision in retaliation for complaining about the need for lookouts. After an investigation, OSHA found that there was reasonable cause to believe that Union Pacific violated the FRSA. OSHA Findings (Jan. 30, 2009). Union Pacific objected to OSHA's findings and the case was assigned to an ALJ for a hearing.

On May 6, 2010, following an evidentiary hearing, the ALJ entered a Decision and Order dismissing the complaint. The ALJ determined that Wignall failed to prove by a preponderance of the evidence that "his position was abolished due to his requests for lookouts or any other safety concerns he may have raised." D. & O. at 10. The ALJ further found that even had Wignall proved that he engaged in protected activity, Union Pacific presented "clear and convincing evidence that [it] would have taken the same unfavorable personnel action regardless of [Wignall's] requests for a lookout." *Id.* at 11.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to issue final agency decisions in cases arising under the Federal Railroad Safety Act to the Administrative Review Board. *See* Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924, 3925 para. 5(c)(15) (Jan. 15, 2010). The ALJ's factual findings are reviewed for substantial evidence. 29 C.F.R. Part 1982.110 (2011). The ALJ's conclusions of law are reviewed de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

Under the Federal Rail Safety Act, railroad carriers engaged in interstate commerce “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee” because the employee provides information to his supervisor related to actions the employee “reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety.” 49 U.S.C.A. § 20109(a). The burden of proof standard under Section 20109(a) was amended on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 1221 Stat 266. The Act amended Section 20109(d)(2)(i) to state that FRSA whistleblower complaints will be governed by the legal burdens set out in AIR 21, 49 U.S.C.A. § 42121(b)(Thomas/West 2007), which contains whistleblower protections for employees in the aviation industry. Under that standard, complainants must show by a “preponderance of evidence” that a protected activity was a “contributing factor” to the adverse action described in the complaint. 49 U.S.C.A. § 42121(b)(2)(B)(i); *see also* 29 C.F.R. Part 1979.109(a). The employer can overcome that showing by demonstrating “by clear and convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of [any protected] behavior.” 49 U.S.C.A. § 42121(b)(2)(B)(ii); *see also* 29 C.F.R. § 1979.109(a).

Following an evidentiary hearing, the ALJ determined that Wignall failed to show that the company’s decision to eliminate his welder position was “due to his requests for lookouts or for any other safety concerns he may have raised.” D. & O. at 10. The ALJ further held that even if Wignall had proven his case, that Union Pacific showed by “clear and convincing evidence” that it would have abolished Wignall’s position “regardless of [his] requests for a lookout.” D. & O. at 10-11. For the reasons explained below, substantial evidence fully supports the ALJ’s determination that Wignall’s position would have been abolished “regardless of [his] protected activity.” *Id.* at 10. In light of our ruling, we need not address whether Wignall proved by a preponderance of the evidence that his communications about the need for a lookout were protected activities that contributed to his adverse personnel action.¹

¹ While we do not affirm based on the ALJ’s findings and conclusions of law on protected activity and causation, we do point out that the ALJ erred in these areas in some respects. First, the ALJ stated that to prove causation, Wignall had to show circumstances that raised an “inference” that the protected activity was a contributing factor to the adverse action. D. & O. at 9. This standard is incorrect because it concerns the prima facie case that a complainant must make to OSHA to sustain a complaint for purposes of investigation. *See* 29 C.F.R. § 1979.104(b)(1)(iv). Once a case goes to hearing before an ALJ, proof of contributing factor is required by a preponderance of the evidence. *Id.* at § 1979.109(a); *see also Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. 4 n.1 (ARB June 29, 2011). Next, the ALJ stated that the period from 2007 (when Wignall complained) until April 7, 2008 (when his position was abolished) was a “gaping hole” in Wignall’s case. D. & O. at 10. However, under whistleblower law articulated by DOL on temporal proximity, a period of several months, or even years, can support an inference of causation depending on the facts of the case. *See, e.g., Anderson v. Jaro Transp. Servs.*, ARB No. 05-011, ALJ Nos. 2004-STA-002, -003, slip op. at 7 (ARB Nov. 30, 2005) (“the lapse of six months between the July protected activity and the December termination is not too long a time period from which to

Substantial evidence in the record fully supports the ALJ's determination that Union Pacific proved that it would have abolished Wignall's welder position even absent any protected activity. D. & O. at 10. Rohlfs and Burchfield testified that Union Pacific introduced Project 75 in 2007, in an effort to develop measures for reducing company costs without compromising safety. Tr. at 302 (Rohlfs); Tr. at 405 (Burchfield testifies that a goal of Project 75 was to implement various cost-saving initiatives to bring the company's operating ratio from about 80% to 75%); Tr. at 371 (Hoerstkamp testifying about reducing expenses and improving the company's operating ratio). Rohlfs and Hoerstkamp learned from other track managers in the local service unit that Union Pacific managed the only welding gangs that employed two welders on a job "instead of a welder and a welder-helper." D. & O. at 7 (citing Tr. at 304-305, 335 (Rohlfs); see also Tr. at 372 (Hoerstkamp)). Hoerstkamp gave Rohlfs permission to abolish a welder and add a welder helper to make the gang consistent with the rest of the two-man welding gangs on the maintenance side of the service unit. D. & O. at 7; Tr. at 370-71 (Hoerstkamp). Rohlfs consulted with Hoerstkamp prior to abolishing various other operator positions at Union Pacific. See *supra* at 2-3 (citing D. & O. at 7; see also Tr. at 308-309). Rohlfs testified that he also made other cost cutting measures during the same period of time that he abolished positions in the company. Tr. at 309. Rohlfs estimated that Union Pacific saved in the tens of thousands of dollars from these initiatives, including the elimination of Wignall's job and the other section jobs. Tr. at 310.

Karol Burchfield, Superintendent of the Council Bluffs Service Unit, testified to an instance where an arc welder position in the service unit was abolished "only five days after it was filled, replacing the welder with a welder helper." D. & O. at 8; see also Tr. at 400-02 (Burchfield). The arc welder position was changed to a welder helper after Burchfield reviewed all of the manning on all of the welding gangs across the Council Bluffs service unit and identified specific jobs for elimination for cost savings purposes. Tr. at 401-02 (Burchfield). Burchfield also learned that some three-man gangs had two welders and one welder helper, and requested that they be changed to one welder with two welder helpers for cost savings. Tr. at 404-05. Burchfield testified that the cost-saving measure affected some management level employees, who either lost their jobs or were reassigned, and that there was a reduction pool made in an effort to give people whose jobs were being cut an opportunity to look for other employment with Union Pacific. Tr. at 407-408. Indeed, Wignall appeared to agree that a welder on a two-person welder gang could be effectively replaced by a welder helper, and stated at the hearing that the welder helper could be paid approximately \$2.83 per hour less than a welder. Tr. at 95, 109, 204.

infer that [employer] was retaliating"); *Thomas v. Arizona Public Svc. Co.*, No. 1989-ERA-019, slip op. at 19 (Sec'y Sept. 17, 1993) (lapse of one year between protected activities and adverse actions sufficient to infer causation). Finally, the ALJ determined that Rohlfs' statement that "I'm tired of you bitching about making field welds" did not relate to safety concerns. D. & O. at 10. While the statement *may* have referred to something other than safety concerns, the statement is indeed too ambiguous and there is *not* substantial evidence to support the ALJ's determination that the statement did not evince Rohlfs' efforts at retaliating against Wignall. Notwithstanding that insufficiently substantiated finding, the ALJ's decision is affirmed based on our conclusion that under the circumstances presented in this case, Wignall's position would have been abolished regardless of any protected activity.

CONCLUSION

The ALJ's determination that Union Pacific proved by clear and convincing evidence that it would have eliminated the welder position that Wignall held even absent any protected activity is supported by substantial evidence in the record and is in accordance with applicable law. The ALJ's Decision and Order is **AFFIRMED**, and Wignall's complaint is **DISMISSED**.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge